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BY: J. DEROIS

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	P1300CR201001325
)	
Plaintiff,)	
)	
vs.)	RESPONSE TO STATE'S MOTION FOR
)	ORDER ALLOWING MANAGEMENT
)	INFORMATION SYSTEMS TO PROVIDE
STEVEN DEMOCKER,)	INFORMATION
)	
Defendant.)	(Oral Argument Requested)
)	
)	(Hon. Gary Donahoe)

Defendant Steven DeMocker, by and through Counsel undersigned, hereby Objects to the State's Motion For Order Allowing Management Information Systems to Provide Information ("Motion"). In its Motion, the state said:

"The documents *allegedly* were accessed through the OnBase system and the rights, privileges, and delivery of those documents were set through that system."

(Motion, pg. 1, italics added).

This is not an accurate statement of fact. The state's recent pleadings carry something akin to a "campaign message," in which the reader is meant to glean the following:

- 1) What the Defense has said regarding the state's repeated illegal and unethical viewing of sealed ex parte documents is merely an "allegation;" and,
- 2) It wasn't the Yavapai County Attorney's Office (YCAO) fault. Despite the fact that

under no circumstances could the YCAO lawyers or staff view sealed ex parte materials, it was the other agencies' fault.

However, it is not an "allegation" that the state illegally accessed sealed ex parte documents 60 times over the period of 14 months, *it is an inescapable fact*. The state admitted this several times. The Clerk's Report proved it. The Arizona Court of Appeals, Division One said very clearly:

The Clerk's report established that County Attorney's Office personnel viewed and/or printed the documents even though the documents plainly were designated "ex parte" and/or "sealed."

In its response to the petition, the State does not dispute or attempt to excuse the acts detailed in the report of the Clerk of the Court and Judge Mackey's order.

(Arizona Court of Appeals, Division One, Decision Order, 03/06/12, pg. 3).

In its Motion, the state wrote:

Ms. Murphy, in particular, is in a unique position to identify documents and information in OnBase, discuss the history of the documents at issue and provide information regarding the rights, privileges, access, and delivery issues that will be relevant to fully understanding the viewing and printing of documents by YCAO personnel as alleged by Defendant.

Frankly, the state's phrase "the history ... rights, privileges, access, and delivery issues" concerning sealed ex parte documents, only relate to the second part of the state's new "campaign message:" *it was the other agencies' fault*. This is not true. It is a red herring.

Further, the state wrote:

... access to the OnBase system and information regarding the documents in that system are essential to the hearing and the parties' preparation for the hearing.

(Motion, pg. 1).

However, *how* the YCAO got the documents does not matter, and is not an issue for the

hearing. Footnote #2 of the Decision Order, stated the obvious:

"The State offers no authority for its implicit assertions that petitioner is estopped or that he has waived relief, *or that the court personnel's mistakes somehow authorized the prosecution to download, read and print other documents submitted or filed under seal.*"

(*Id.*, italics added).

Footnote #1, noted a lawyer's duty to report a document that they should not have received:

Pursuant to Rule 4.4(b) of the Arizona Rules of Professional Conduct, "A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." See Chamberlain Group, Inc. v. Lear Corp., 270 FRAT 392, 398 (N.D. Ill. 2010) (lawyer's duty to disclose receipt of privileged document under this rule applies even when documents are received outside normal discovery process).

(*Id.*).

In this case, the state never reported its viewing, printing nor shredding of sealed ex-parte documents to anyone. The state has had over a year -- since Judge Mackey's March 16, 2011 "Ruling" -- to come up with any evidence that they ever alerted anyone, but did not. Because it did not happen. For instance, in the Jarrell Report, Deb Cowell, YCAO Paralegal was interviewed:

. . . She said that, when ". . . I caught errors like that, and I just call the Clerk's Office and say, 'This is in the wrong place', and they're able to correct it . . . just like our things get mis-filed." I asked Cowell if she had ever discovered that situation during her assignment to the DeMocker case, and *she said she had not.*

If the state is now going to claim that they *did* alert anyone about its viewing, printing and shredding of sealed ex-parte documents, then the Court must respond to this dubious about-face accordingly.

From the state's Motion, it appears that the state is attempting to bypass the Clerk of Court through members of Management Information Systems. The Defendant objects. The Clerk of Court has an interest in this matter as it is the entity responsible for the entry of the documents into the system. The Clerk of Court clearly has an objection to the state's course of action. Because of the Clerk of Court's position, the state may seek Depositions pursuant to Rule 15.3, Arizona Rules of Criminal Procedure.

However, this is not a road untraveled. The state already knew about the problems with the Clerk's Office, from its own Jarrell Report:

On Monday, 09 May 2011 I went to the Office of the Clerk of the Superior Court, Yavapai County and spoke to Clerk of the Superior Court Sandra Markham, and three (3) staff members, Renee Braner, Karen Wilkes, Katherine Gibbs. I asked Markham for general information about the OnBase system, for use by the Yavapai County Attorney's Office in preparing a response to the motion filed by Craig Williams and I needed to know how the Clerk's Office used OnBase because I was unfamiliar with the system. Markham told me that she was uncomfortable discussing OnBase with me, and that she would have to consult with her legal advisor at the Arizona Attorney General's Office to determine what she would share with me. Later that afternoon, I received a telephone message from Markham in which she said that she was "uncomfortable" providing me with information about their "internal process," that she was not a party to this case and that, with advice from her legal advisor, *she would not cooperate in this investigation absent a court order*. I advised Paupore and Schmidt of this information.

(Jarrell Report, "Clerk of Superior Court, Yavapai County" section, italics added).

In the state's May 27, 2011 Response to the Motion to Dismiss/Disqualify, YCAO Chief Deputy Dennis McGrane wrote, in footnote #1, page 2-3:

An attempt was made to interview staff at the Clerk's Office, but they required a court order to comply. Therefore, the exact nature of the testimony that would be elicited is unknown, although there is no information that would indicate that it would be inconsistent with the information provided in Exhibit A¹.

¹Exhibit A was the Jarrell Report.

While the Yavapai County Management Information System is not an agent of the state, both agencies are part of the same county government. The Defendant is not. MIS installs and maintains the YCAO's computer systems. It is simply not a good idea to by-pass the safeguards the Clerk's Office provides.

In its Motion, the state wrote:

Because MIS is the administrator of OnBase, it traditionally requests authority from the department that entered documents into the document management system before providing any information regarding those documents or the history of access, rights, privileges, and delivery of those documents. Here, the documents at issue were scanned into OnBase by the Clerk of Court, so MIS would traditionally request authorization from the Clerk of Court to provide any of this information.

Again, there is no question that the state viewed, printed and shredded sealed ex-parte documents. No communication with MIS will change that. Again, this entire pursuit is merely a red herring. While it is true that no party "owns" a witness, the Defendant is worried about any communications between MIS and the YCAO that the Defendant is not privy to. What may be produced could be another self-serving in-house investigation, like the Jarrell Report.

Much of the state's defense to its legal and ethical peccadilloes can be summed up this way: "Yes, we confess to viewing and printing sealed ex parte documents, but it was not our fault. It was MIS' fault, it was the Clerk of Courts' fault, it was Judge Lindberg's fault, and if all that fails, it was the Defense's fault."

In her March 14, 2012 Interoffice Memorandum to the Board of Supervisors, Yavapai County Attorney Sheila Polk said:

The determination as to which documents are scanned to OnBase is wholly within the purview of the Clerk of the Superior Court. Whether employees of this office viewed any documents not intended for our eyes, and the consequences if this occurred, will be explored at the upcoming evidentiary hearing. It is clear, however, that our actions in accessing OnBase *were the direct result of the steps taken by the Clerk of the Superior Court* to pass the costs of document production to the County Attorney's Office. (Italics added).

The Jarrell Report, "Yavapai County Management Information Systems on May 12, 2011," said, in the applicable part:

. . . The Clerk of the Court's Office may advise MIS that they will allow that level of access to that "user group," or that they don't wish to allow that level of access to that "user group." MIS then makes the changes as directed. The "requester" cannot come directly to MIS to ask for access to another department's documents, they must ask the entity that owns the information.


The state's real problem is that the Clerk correctly sought legal advice with the Arizona Attorney General's Office after having been blamed by the state for the state's own behavior. The Clerk probably saw the proverbial freight train coming down the tracks.

The state's Motion is without merit, and should be denied.

RESPECTFULLY SUBMITTED this April 20, 2012.



Craig Williams
Attorney at Law

A copy of the foregoing delivered to:
Hon. Gary Donahoe, Division One, via e-mailed .pdf;
Jeff Paupore, Steve Young, Yavapai County Attorney's Office, via e-mailed .pdf, the filed copy is in courthouse box;
Russell Yurk (Jones, Skelton & Hochuli, P.L.C.), via e-mailed .pdf;
The Defendant;
Greg Parzych, via e-mailed .pdf
by:  _____